(20)

Office Supreme Court, U. S.
FILED
APR 4 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 561

MARK SKINNER WILLING, AND THE NORTHERN TRUST COMPANY, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HENRY J. WILLING, DECEASED,

Petitioners,

vs.

CHICAGO AUDITORIUM ASSOCIATION,

Respondent.

BRIEF FOR RESPONDENT.

WALTER L. FISHER,
WILLIAM C. BOYDEN,
WILLIAM W. CASE,
134 South La Salle Street,
Chicago, Illinois,
Counsel for Respondent.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

PAGE

The issues and their discussion 1

Statement of the case 5

Argument 15

I.

EQUITY JURISDICTION.

Essentials of equity jurisdiction 15

A legal right to the use of property is an incident of its ownership and not the result of a denial of that right 16

History of original writs and forms of action as limitations on the administration of justice 20

Partial emancipation through the device of legal fictions 24

Further emancipation through the growth of equity .. 26

Professor Pomeroy's analysis of equity 30

Doctrine that equity is limited by existing "heads of equity jurisprudence" relates to substantive rights and not to remedial forms 33

The bill of complaint considered as one to remove cloud on title 39

Alleged controlling effect of Illinois local law 42

Equity is not disabled from deciding an issue merely because that issue would not alone be sufficient to support the jurisdiction 49

Alleged incompetence of equity to remove as clouds adverse claims not asserted otherwise than orally 51

Alleged want of affirmative assertion of adverse claims in this case 54
Illustrations of circumstances under which equity removes clouds from title 59
The New York case of Rector v. Rector..... 64
Absence of remedy at law as basis of equity jurisdiction 66
What is an adequate legal remedy..... 68
Acting on a doubtful right, where a mistake would entail ruinous consequences, not an adequate legal remedy 70
Ability to defend an action at law which the opposing party does not bring is not an adequate remedy 71
Declaratory judgments 74

II.

FEDERAL JURISDICTION.

Removal of separable controversies 77
Separable controversies and indispensable parties.. 82
Distinction between decrees respecting the rights of particular persons in property, and those affecting the property in which those rights inhere..... 86
Multifariousness 89
Separable controversies in suits to quiet title..... 92
The mortgage trustee not an indispensable party to the removable controversy in this case..... 98

III.

PLAINTIFF'S RIGHT TO REBUILD.

Comprehensive statement of facts 102
General rights of a lessee to use of demised property 109
The law of waste 112
Rights under ground leases of vacant business property 113
Tenant's right with respect to improvements dependent on the circumstances of each case..... 116
Covenants of the leases 125
Covenants construed as security for rent..... 125
Covenants construed in accordance with public policy 130
Covenants construed in accordance with reason and justice 134
Implications from affirmative provisions of the leases in this case 136
Alleged effect of covenants to repair and rebuild... 139
Conditions and form of relief..... 143
Plaintiff's case not prejudiced by its offer to give security and do equity..... 143
The decree sought by plaintiff would not impose upon the court administrative duties beyond its competency 149
Conclusion 154

Table of Cases Cited.

Agate v. Lowenbein, 57 N. Y. 604 122
Alabama Southern R. R. Co. v. Thompson, 200 U. S. 206 91
American Coal Co. v. Indiana Cotton Mills, 78 Ind. App. 115; 134 N. E. 891 123
A. Leschen & Sons Rope Co. v. Mayflower Co., 173 Fed. 855 134
American Smelting Co. v. Bunker Hill Co., 248 Fed. 172, 182 151
Anway v. Grand Rapids Ry. Co., 211 Mich. 592; 179 N. W. 350 74
Antomarchi v. Russell, 63 Ala. 359 153
Atchison Ry. Co. v. Stamp, 290 Ill. 428 63

Bacon v. Felt, 38 Fed. 870 91-95
Bank of Kentucky v. Stone, 88 Fed. 383 73
Barney v. Latham, 103 U. S. 205 78-79-90-91-97
Barnsdall Oil Co. v. Leahy, 195 Fed. 731 134
Bass v. Metropolitan W. S. E. Railroad, 827 Fed. 857 118
Batchelor v. Hinkle, 210 N. Y. 243; 104 N. E. 629 124
Bates v. Carpentier, 98 Fed. 452 95
Bedford Stone Co. v. Oman, 134 Fed. 441 58
Bitterman v. Louisville Railroad Co., 207 U. S. 205 89
Blair v. Chicago, 201 U. S. 400 57-60
B. & O. R. Co. v. Voigt, 176 U. S. 514 131
Bonney v. Greenwood, 96 Me. 335; 52 Atl. 786 153
Brick v. Brick, 98 U. S. 514 131
Brown v. Cox, 158 Ind. 364; 68 N. E. 568 57
Brown v. Trousdale, 138 U. S. 389 86
Buckner v. Carr, 302 Ill. 378 46

Callisher v. Bischoffsheim, L. R. 5 Q. B. 449 69
Carothers v. McKinley Mining Co., 116 Fed. 947 96
Carson v. Hyatt, 118 U. S. 279 101

Cary v. Cary, 309 Ill. 330 123
Chicago, R. I. & P. Ry. Co. v. Dobell, 229 U. S. 102 .. 91
City of LaFollette v. LaFollette Water Co., 252 Fed. 762 .....147, 150
Clark v. Smith, 13 Pet. 195 44
Cole v. Green, 1 Lev. 309 112
Commodores Point Terminal Co. v. Hudnall, 283 Fed. 150 90
Construction Co. v. Cane Creek Township, 155 U. S. 283 87
Contee v. Lyons, 19 D. C. 207 63
Cowell v. Colorado Springs Co., 100 U. S. 55 131
Cronen v. Moore, 210 Fed. 239 148
Cropper v. Bowles, 150 Ky. 393; 150 S. W. 380 132
Crump v. Thurber, 115 U. S. 56 86
Curtiss v. Brown, 29 Ill. 201 123

Darcy v. Askwith, Hob. 234 112
Davidson v. Montana Dakota Co., 22 Fed. (2d) 688 .. 98
Davis v. Hone, 2 Sch. & Lef. 340 146
Denegre v. Walker, 214 Ill. 113 123
Dodge v. Cole, 97 Ill. 338 68
Doe v. Earl of Burlington, 5 B. & Ad. 507 113
Doe v. Jones, 4 B. & Ad. 126 138
Doherty v. Allman, L. R. 3 App. Cas. 709 .....
.....112-114-121-135-138
Dr. Miles Medical Co. v. Park, 220 U. S. 373 131

Egerton v. Brownlow, 4 H. L. Cas. 1 132
Elder v. Western Mining Co., 237 Fed. 966 90
Elmendorf v. Taylor, 10 Wheat. 152 83

Fick & Webb, 263 U. S. 326 71
Field v. Lownsdale, 1 Deady 288; 9 Fed. Cas. 4769 .. 93
Fort Scott v. Hickman, 112 U. S. 150 154
Fowle v. Park, 131 U. S. 88 131
Fraser v. Jennison, 106 U. S. 191 79

Fredenberg v. Whitney, 240 Fed. 819..... 73
Fulton v. Krull, 200 N. Y. 105, 93 N. E. 494..... 154
Fulwiler v. McClun, 285 Ill. 174.....19-47-49-63

Gavin v. Curtin, 171 Ill. 640..... 19
Geer v. Mathiesen Alkali Works, 190 U. S. 426....91-97
Gibbs v. Consolidated Gas Co., 130 U. S. 396..... 131
Gilmore v. Keogh, 241 Ill. App. 28..... 125
Goldsmith v. Gilliland, 24 Fed. 154..... 94
Goodenough v. Warren, 5 Sawy. 494; 10 Fed. Cas. 5534 93
Graves v. Ashburn, 215 U. S. 311..... 90
Gray v. Blanchard, 8 Pick. 284..... 131
Great Lakes Co. v. Scranton Coal Co., 239 Fed. 603.. 151
Greene v. Sisson, 2 Curt. 171; 10 Fed. Cas. 5768.... 87
Greenough v. Greenough, 284 Ill. 416..... 46
Guffey v. Smith, 237 U. S. 101..... 43
Gwinn v. Rogers, 92 W. Va. 533, 115 S. E. 428..... 110

Hagan v. Walker, 14 How. 29..... 87
Harkness v. Lisle, 132 Ky. 767; 117 S. W. 264..... 132
Harrison v. Owsley, 172 Ill. 629..... 46
Harrow School v. Alderton, 2 B. & P. 86..... 112
Hawes v. Favor, 161 Ill. 440.....115-128-135
Hay v. May Department Stores, 271 U. S. 318..... 91
Heartt v. Kruger, 121 N. Y. 386; 24 N. E. 841..... 153
Hobbs v. McLean, 117 U. S. 567..... 135
Holland v. Challen, 110 U. S. 15.....39-41-44-60-72
Holmes v. Millage (1893) Q. B. 551.....36-37
Hutchinson v. Ulrich, 145 Ill. 336..... 135
Hygrade Provision Co. v. Sherman, 266 U. S. 497... 49
Hyman v. Rose, L. R. (1912) App. Cas. 623..... 145

Illinois Central R. R. Co. v. Sheegog, 215 U. S. 308.. 91

Jackson v. Bruns, 129 Iowa 616; 106 N. W. 1..... 153
Jones v. Chappell, L. R. 20 Eq. 539.....112-138
Joy v. St. Louis, 138 U. S. 1..... 150

Kearns-Gorsuch Co. v. Hartford Co., 1 Fed. (2d) 318 151
Kendig v. Brown, 94 U. S. 423 86
King v. Hobbs, 1 Yelv. 26 69
Klie v. Von Broock, 56 N. J. Eq. 18; 37 Atl. 469 118

Levy v. S. H. Kress & Co., 285 Fed. 836 59
Liberty Warehouse Co. v. Grannis, 273 U. S. 70 37
Louisville & Nashville R. R. Co. v. Ide, 114 U. S. 52 .. 91
Lovell v. Marshall, 162 Minn. 18; 202 N. W. 64 53

McArthur v. Hood Rubber Co., 221 Mass. 372; 109 N. E. 162 40-63-124
McCarty v. McCarty, 275 Ill. 573 47
McClure v. Leaycraft, 183 N. Y. 36; 75 N. E. 961 124
McConihay v. Wright, 121 U. S. 201 42
McMullen v. Halleck Cattle Co., 193 Fed. 282 97
Marsh v. Reed, 184 Ill. 263 123
Martin v. Fort, 83 Fed. 19 87
Mechanic's Bank v. Lynn, 1 Pet. 376 147
Melms v. Pabst Brewing Co., 104 Wis. 7; 79 N. W. 738 120
Merriam v. United States, 107 U. S. 437 135
Merrill-Ruckgaber Co. v. United States, 241 U. S. 387 135
Meux v. Cobley, L. R. (1892) 2 Ch. 253 123-137
Meyer v. Richards, 163 U. S. 385, 415 154
Miller v. Staggs, 266 Mo. 339; 181 S. W. 116 154
Moore v. Shoemaker, 10 App. Cas. (D. C.) 6 153
Moss Point Lumber Co. v. Board, 89 Miss. 448; 42 So. 290 112
Muskrat v. United States, 219 U. S. 346 74

Nash v. Towne, 5 Wall. 689 135
National Bank v. Carpenter, 101 U. S. 567 68
New Jersey v. Sargent, 269 U. S. 328 37
New York Central R. R. Co. v. Lockwood, 17 Wall. 357 131

Niles-Bement Co. v. Iron Moulders' Union, 254 U. S. 77 101
Noonan v. Bradley, 9 Wall. 394..... 135
North Carolina Mining Co. v. Westfeldt, 151 Fed. 290 96
N. Y. & N. H. Ry. Co. v. Schuyler, 17 N. Y. 592..... 59

O'Connor v. Thetford, 174 S. W. (Tex.) 680..... 132
Odd Fellows Assn. v. Hegele, 24 Ore. 16; 32 Pac. 679 153
Ohio Tax Cases, 232 U. S. 576..... 50
Oklahoma Operating Co. v. Love, 252 U. S. 331..... 70
Old Dominion Oil Co. v. Superior Oil Corp., 283 Fed. 636 98
Oman v. Bedford Stone Co., 134 Fed. 64..... 52

Pacific Railroad Company v. Ketcham, 101 U. S. 289 101
Packard v. Banton, 264 U. S. 140..... 49
Packard v. Illinois T. & S. Bank, 261 Ill. 450..... 123
Page v. Murray, 46 N. J. Eq. 325; 19 Atl. 11..... 124
Parker v. Shannon, 121 Ill. 452.....46-60
Partridge v. Gilbert, 15 N. Y. 601..... 153
Peirce v. New York Dock Co., 265 Fed. 148..... 135
Peugh v. Davis, 96 U. S. 332..... 131
Pierce v. Dyer, 109 Mass. 374..... 153
Pierce v. Society of Sisters, 268 U. S. 510..... 71
Pike v. Cincinnati Realty Co., 179 Fed. 97...122-127-141
Pirie v. Tvedt, 115 U. S. 41..... 91
Pope Mfg. Company v. Gormully, 144 U. S. 224.... 133
Porterfield v. Webb, 263 U. S. 225..... 71
Presby v. Benjamin, 169 N. Y. 377; 62 N. E. 430.... 110
Pressed Steel Co. v. Eastern Ry Co., 121 Fed. 609... 134
Pritchard v. Bailey, 113 N. C. 525; 18 S. E. 668..... 132
Pullman Car Co. v. Metropolitan Ry. Co., 157 U. S. 94 154
Pusey v. Hanssen, 261 U. S. 491..... 45
Pynchon v. Stearns, 11 Metc. 304.....112-116

Raphael v. Trask, 194 U. S. 272 86
Rector, etc. v. Rector, etc., 201 N. Y. 1; 94 N. E. 191 64
Rector, etc. v. Rector, etc., 130 App. Div. 166; 114 N. Y. Supp. 623 65
Rees v. Watertown, 19 Wall. 107 37
Risty v. Railway Co., 270 U. S. 378 50
Roberson v. Rochester Box Co., 171 N. Y. 538; 64 N. E. 442 36
Russell v. Clarke's Executors, 7 Cranch. 69 83
Rutland Marble Co. v. Ripley, 10 Wall. 339 150

Salem Trust Co. v. Mfrs. Finance Co., 264 U. S. 182 87
Schell v. Leander Clarke College, 2 Fed. (2d) 17 90
Schwab v. St. Louis, 310 Mo. 116; 274 S. W. 1058 ... 73
Seeley v. Baldwin, 185 Ill. 211 46
Shaffer v. Carter, 252 U. S. 37 50
Sharon v. Tucker, 144 U. S. 533 18-62-63
Sherman v. Fitch, 98 Mass. 59 71
Sherrill v. Connor, 107 N. C. 630; 12 S. E. 588 112
Shields v. Barrow, 17 How. 130 83
Shine v. Wilcox, 1 Dev. & B. Eq. 631 112
Sioux City Terminal Co. v. Trust Co., 82 Fed. 124 .. 84
Slegel v. Harbine, 148 Pa. St. 236; 23 Atl. 996 53-74
Smyth v. Carter, 18 Beav. 78 121
Stanbrough v. Cook, 38 Fed. 369 94
Stebbins v. Perry County, 167 Ill. 567 59
Steele v. Culver, 211 U. S. 26 101
St. Louis Ry. Co. v. Wilson, 114 U. S. 60 86

Terrace v. Thompson, 263 U. S. 197 49-71
Texas Co. v. Central Fuel Oil Co., 194 Fed. 1, 14 151
Thompson v. Emmett Irrigation District, 227 Fed. 560 51
Tobin v. Walkinshaw, 1 McAll. 26; 23 Fed. Cas. 14068 87
Toledo Ry. Co. v. Pennsylvania Co., 54 Fed. 746 67
Tooley v. Windham, Cro. Eliz. 206 69
Truax v. Raich, 239 U. S. 33 49

Union Pacific Ry. Co. v. C. R. I. & P. Ry. Co., 163 U. S. 564 149
United States v. Alaska Steamship Co., 253 U. S. 113 76
United States v. Hamburg-American Co., 239 U. S. 466 76

Vaca Valley Co. v. Mansfield, 84 Cal. 560; 24 Pac. 145 57
Vanderbilt v. Mitchell, 71 N. J. Eq. 632; 63 Atl. 1107 35
Vanderbilt v. Mitchell, 72 N. J. Eq. 910; 67 Atl. 97.. 36
Van Duyn v. Chase, 149 Iowa 222; 128 N. W. 300.... 135
Vassar College v. Loose Wiles Biscuit Co., 197 Fed. 983 38
Venner v. Southern Pacific Co., 279 Fed. 832.....92-98
Voss v. Murray, 50 Ohio St. 19; 32 N. E. 1112..... 71

Wadley So. Ry. Co. v. Georgia, 235 U. S. 651..... 70
Walker v. Converse, 148 Ill. 622..... 63
Warren v. Warren, 279 Ill. 217..... 47
Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33 88
Webb v. O'Brien, 263 U. S. 313..... 71
Willard v. Tayloe, 8 Wall. 557 147
Williams v. Bankhead, 19 Wall. 563..... 93
Wilson v. Oswego Township, 151 U. S. 56..... 87
Windemere Impvt. Assn. v. Bank, 205 Mich. 539; 172 N. W. 29 124
Winfield v. Wichita Natural Gas Company, 267 Fed. 47 97
Winship v. Pitts, 3 Paige 259 112
Wood v. Dummer, 3 Mason 308; 30 Fed. Cas. 17944 87
Wright v. Vocalion Organ Co., 148 Fed. 209..... 148

Young, Ex parte, 209 U. S. 123..... 70

Other Citations.

Corpus Juris, vol. 13 69
Cyc., vol. 32 40

Encyclopaedia Britannica (11th ed.) vol. 28..... 26
Encyclopaedia of Evidence, vol. 12 57

Harvard Law Review 40-124-148
Holdsworth History of English Law (3rd ed.) vol. 2 21-22-23-27

Maine, Ancient Law 24-25-26

Pomeroy, Equity Jurisprudence (4th ed.)....22-28-30-67

R. C. L., vol. 25, p. 344..... 146

Spence, Equitable Jurisdiction, vol. 1.....21-27-28-29
Stephen on Pleading 23

Tiffany, Landlord and Tenant, vol. 1..... 110

Williston on Contracts, vol. 3..... 131